

**Kenai Peninsula Borough, Alaska  
144 North Binkley Street  
Soldotna, Alaska 99669**

In the matter of the Kenai Peninsula )  
Borough Planning Commission's decision )  
to approve a conditional use permit )  
for a material site that was requested for )  
KPB Parcel 169-010-67; Tract B, McGee )  
Tracts - Deed of Record Boundary Survey )  
(Plat 80-104) - Deed Recorded in Book 4, )  
Page 116, Homer Recording District )  
Hans Bilben, )  
Appellant )  
Emmitt and Mary Trimble )  
Beachcomber, LLC, )  
Applicants )  
\_\_\_\_\_ )

Case No. 2019-01-PCA

**HEARING OFFICER DECISION AND ORDER**

**I. INTRODUCTION**

The undersigned hearing officer held a hearing in the above-titled appeal on October 30, 2019. Appellant Hans Bilben ("Appellant") appealed the Kenai Peninsula Borough Planning Commission's ("Commission") approval of Beachcomber, LLC's ("Applicant") application for a conditional land use permit ("CLUP" or "material site permit") for a material site on KPB Parcel 169-010-67. Twenty-nine individuals joined

Appellant's Opening Statement.<sup>1</sup> Pete Kineen filed a separate Opening Statement. The Kenai Peninsula Borough ("Borough") and the Applicant each filed Opening Statements.

After careful review and consideration of the Record, the legal arguments presented by the parties and their representatives both at the hearing and in writing, and applicable law, the undersigned hearing officer finds that the Commission's findings of fact are supported by substantial evidence and that due consideration is warranted to the Commission's legal interpretations of the Borough Code ("Code"). The Commission's decision to approve the Application is therefore upheld.

## **II. PROCEDURAL AND FACTUAL BACKGROUND**

On June 4, 2018, Applicant filed an application with the Kenai Peninsula Borough for a conditional land use permit to extract peat, sand and gravel from its property (the "Application").<sup>2</sup> Beachcomber also owns the property on which the proposed material site would be located, 74185 Anchor Point Road (KPB Tax Parcel 169-010-67), an irregularly shaped parcel of 41.72 acres. The site plan and associated documents attached to the Application stated that extraction would be limited to the eastern 27.7 acres of the parcel and that the site haul route would be via Denver Street, a Borough maintained road, to Anchor Point Road.

This is the second appeal regarding this Application. The first time the Commission considered the Application in 2018, the Commission denied the

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<sup>1</sup> Philip Brna, George Krier, David Gregory, Theresa Ann Jacobson, Rick Oliver, Shirley Gruber, Todd Bareman, Xochitl Lopez-Ayala, Richard and Marie Carlton, Mike and Linda Patrick, Joseph Sparkman, Vickey Hodnik, Michael Brantley, Gary Cullip, John Girton, Linda R. Bruce, Steve Thompson, Lynn Whitmore, Donald and Lori Horton, James Gorman, Linda Stevens, Gary and Eileen Sheridan, Thomas J. Brook, and Joshua and Christine Elmaleh.

<sup>2</sup> R. 1-10.

Application, which led Applicant to an appeal. A hearing officer reviewed the matter on appeal and remanded the case back to the Commission with instructions to conduct additional fact hearings and draft more detailed findings in support of their decision.<sup>3</sup>

In 2019, the Commission considered the Application again at public meetings on March 25, April 8, April 22, June 10, and June 24, 2019. The Commission heard public comments at the June 10 meeting.<sup>4</sup> At the final meeting on June 24, 2019, the Commission reversed its earlier decision and voted to approve the Application via Resolution 2018-23.<sup>5</sup> Resolution 2018-23 contains 30 findings of fact and 22 permit conditions.<sup>6</sup>

### **III. STANDARD OF REVIEW**

Pursuant to the Kenai Peninsula Borough Code of Ordinances ("KPB"), the following three standards apply to an appeal of the Commission's decision:

1. The hearing officer may exercise independent judgment on matters that relate to the interpretation or construction of ordinances or other provisions of law; however, due consideration shall be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21.
2. The hearing officer shall defer to the judgment of the planning commission regarding findings of fact if they are supported in the record by substantial evidence.
3. The hearing officer may revise and supplement the planning commission's findings of fact. Where the hearing officer decides that a finding of fact made by the planning commission is not supported by substantial evidence, the hearing officer may make a different finding on the factual issue, based upon the evidence in the record developed before the planning commission if it concludes a different finding was supported

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<sup>3</sup> R. 276-291.

<sup>4</sup> T. 116-187.

<sup>5</sup> T. 200.

<sup>6</sup> R. 247-252.

by substantial evidence, or may remand the matter to the planning commission as provided in KPB 21.20.330(B).<sup>7</sup>

The above standards both define and limit a hearing officer's authority.

#### **IV. FINDINGS AND DECISION**

After reviewing the record, statements of the parties, oral presentations at the hearing, and the relevant law, it is my determination as the hearing officer for this appeal that the Commission acted within the scope of its authority in approving the Application. Due consideration must be given to the Commission's expertise and experience in interpreting KPB titles 20 and 21, and the additional facts presented at the Commission's 2019 public meetings on this Application provide the evidence to support the Commission's findings of fact, and for these reasons the Commission's decision is upheld.

##### **A. Appellant's Procedural Claims**

Appellant's Opening Statement first raises two procedural issues – arguing that Commissioner Ruffner should have been disqualified for bias pursuant to KPB 21.20.240, and that the Commission improperly failed to allow public comment towards the end of the series of public meetings.<sup>8</sup> Neither claim has merit. KPB 21.20.240 concerns conflicts of interest for hearing officers and does not apply to Commission members. No Code provision specifically prohibits bias in Commission decision-making, but even if such a prohibition could be read into the Code as a whole, the outcome of the Commission's vote on this Application did not turn on one vote. If

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<sup>7</sup> See KPB 21.20.320

<sup>8</sup> R. 862 – 865.

Commissioner Ruffner should have been excused from deliberating and voting on the Application on the basis of bias, the final vote tally was eight “yes” votes to two “no” votes,<sup>9</sup> and therefore removing Commissioner Ruffner’s “yes” vote would not have changed the outcome of the vote.

Appellant also argues that it was unfair for the Commission to allow Applicant to respond to public comments after the public comments on the Application were closed.<sup>10</sup> The bulk of the public comments on this Application were heard in the June 10, 2019 meeting, at the conclusion of which public comments were closed and deliberations on the Resolution were postponed.<sup>11</sup> At the June 24, 2019 meeting, Applicant responded to some of the comments and answered questions from the Commission.<sup>12</sup>

Appellant does not cite any Code provision in support of the argument that this sequence of events is unfair. Appellant does point to language in the Planning Commission Manual, which provides that if the Commission allows new testimony in the Applicant’s rebuttal, the Commission “may...take additional public comment regarding the new evidence.”<sup>13</sup> However, this language is permissive (using the term “may”), and therefore does not require the Commission to take additional public comment on rebuttal testimony. More broadly, a fair proceeding is one where participants in a government process receive the “opportunity to be heard and the right to adequately

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<sup>9</sup> T. 200.

<sup>10</sup> R. 863-865.

<sup>11</sup> T. 150, 159.

<sup>12</sup> T. 192-194.

<sup>13</sup> R. 864.

represent one's interests".<sup>14</sup> The opportunity to be heard does not necessarily include the right to comment on every detail of a proposed activity, only adequate and reasonable. The record indicates that the individuals in opposition to the Application's approval had at least two different opportunities to present their concerns: through written comments and in person comments at the June 10 meeting. There was no unfairness perpetrated as a result of allowing Applicant to briefly make follow-up comments.

Pete Kineen, in his Opening Statement in support of remanding the Commission's decision, also alleges procedural errors that include prosecutorial misconduct and other unspecified misconduct related to the Borough's influence over the Commission members' decision-making.<sup>15</sup> Neither claim is supported by the evidence in the record. An application for a conditional land use permit is not a criminal matter and the Commission does not have any authority to enforce criminal provisions of the Borough Code. As for other improper conduct, Mr. Kineen's opening statement provides scant detail as to the nature of the Borough's alleged influence. Absent specific details, the hearing officer has no facts on which to review these claims.

#### **B. Appellant's Substantive Claims**

Appellant makes three arguments against the Commission's decision to approve the Application: (1) the Commission should have made its decision within the context of an interpretation of the Code that the Commission has the authority to disapprove a

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<sup>14</sup> See *Keyes v. Humana Hospital Alaska, Inc.*, 750 P.2d 343, 353 (Alaska 1988).

<sup>15</sup> R. 856-858.

CLUP application,<sup>16</sup> (2) the Commission was required to independently consider the standards in KPB 21.29.040 and the specific permit conditions in KPB 21.29.050, and (3) the Commission's findings of fact were not supported by substantial evidence.<sup>17</sup> None of these arguments compel the hearing officer to disturb the Commission's interpretation of the Code or the Commission's findings of fact.<sup>18</sup>

Appellant points out that the Commission has the authority to disapprove or deny a CLUP application. KPB 21.25.050.B. provides that the Commission shall "either approve, modify or disapprove" a CLUP application. KPB 21.29.040 and 21.29.050 supply the specific guidelines and requirements the Commission must use when determining whether to approve, modify, or disapprove a material site permit such as the one submitted by Beachcomber in this case. The fact that the Commission reversed its prior decision on this Application and approved the Application on the second round is not sufficient to justify overturning the Commission's decision. The Commission gathered additional facts and evidence on the second round, as evidenced by the additional public meetings at which the Applicant and members of the public testified and presented evidence, and ultimately determined that the Application did meet the requirements in KPB 21.29.040 and 21.29.050.<sup>19</sup>

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<sup>16</sup> R. 869.

<sup>17</sup> R. 869. These two broad categories encompass the substantive appeal points listed in Appellant's original appeal filing, see R. 789-791.

<sup>18</sup> Pete Kineen joined in Appellant's arguments. See R. 856.

<sup>19</sup> R. 248, "Compliance with the mandatory conditions in KPB 21.29.050, as detailed in the following findings, necessarily means that the application meets the standards contained in KPB 21.29.040."

Appellant next argues that KPB 21.29.040 and 21.29.050 must be read independently.<sup>20</sup> This is a legal argument whereby Appellant advances an interpretation of the Code that is in opposition to the Commission's interpretation. The Commission interprets the Code to mean that these two provisions are read together, and that compliance with KPB 21.29.050 necessarily means that KPB 21.29.040 is satisfied.<sup>21</sup> In the face of differing opinions on Code interpretation, the standards of review require the hearing officer to give due consideration to the Commission's expertise and its interpretations of Titles 20 and 21 of the Code.

It is well-established that planning "authorities are bound by the terms and standards of the applicable zoning ordinance, and are not at liberty to either grant or deny conditional use permits in derogation of legislative standards."<sup>22</sup> Given the plain meaning of the word "only" in KPB 21.29.040, KPB 21.29.040 bars the Commission from imposing conditions in CLUPs that are not contained in KPB 21.29.050. Thus, the conditions in KPB 21.29.050 are the "sole" or "exclusive" conditions that may be applied. No additional conditions are required of the Applicant by the Code, and the Commission lacks the authority to impose additional conditions, except as the Applicant may voluntarily agree to

The citation to KPB 21.29.050 in the text of KPB 21.29.040 indicates that the drafters of these two Code provisions intended them to be read together, rather than independently. Thus, the specific conditions in KPB 21.29.050 are the "sole" or

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<sup>20</sup> R. 869-870.

<sup>21</sup> R. 248.

<sup>22</sup> *S. Anchorage Concerned Coal., Inc. v. Coffey*, 862 P.2d 168, 174 (Alaska 1993) quoting *Thurston v. Cache County*, 626 P.2d 440, 444-45 (Utah 1981).



“exclusive” conditions that may be applied to minimize the adverse impacts listed in KPB 21.29.040. The Commission’s interpretation that these two provisions must be read together, and that compliance with KPB 21.29.050 necessarily means compliance with KPB 21.29.040, is reasonable.

As explained in the first hearing officer’s decision in this case, the Code does not afford the Commission discretion to judge the effectiveness of the conditions identified in KPB 21.29.050. Instead, the Code grants the Commission limited authority to review material site permit applications to ensure that the conditions in KPB 21.29.050 are met and the application complies with the application requirements. The testimony of the Appellant and other parties in opposition to the Application shows the depth of concern of neighboring property owners, but ultimately it is the Borough Assembly that has the authority to set the conditions and standards required for material site permits under KPB 21.29.040 and 21.29.050, or change those conditions and standards. The Commission’s interpretation of KPB 21.29.040 and 21.29.050 is a reasonable one based on the language in those provisions. The hearing officer therefore finds no reason so substitute her judgment for that of the Commission.

Finally, Appellant argues that there was insufficient evidence to support the Commission’s findings of fact, mainly with respect to noise and visual impacts.<sup>23</sup> Appellant does not call out any specific finding of fact that is allegedly unsupported by substantial evidence in the record, but points to the number of individuals opposing the Application, the “rolling berm” voluntary condition, and the unchanged geography of the

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<sup>23</sup> R. 870.

site.<sup>24</sup> Appellant also argues that none of the findings of fact indicate how the evidence “shifted” from the first time the Commission considered the Application.<sup>25</sup>

As explained above, due consideration must be given to the Commission’s interpretation of the Code. The Commission interprets the Code to require that only the conditions set forth in KPB 21.29.050 may be imposed to ensure the standards in KPB 21.29.040 are met. Thus, there must be substantial evidence in the record to support the Commission’s findings that the conditions in KPB 21.29.050 are imposed by the CLUP granted in Resolution 2018-23. Substantial evidence is defined in KPB 21.20.210.A.7. as “relevant evidence a reasonable mind might accept as adequate to support a conclusion.” Notably, substantial evidence does not require a weighing of the number of persons on either side of an issue. Findings prepared by staff that are supplemented by documents in the record and statements in transcripts, and adopted by the Commission, are sufficient.<sup>26</sup>

The large number of individuals presenting testimony in opposition to the Application is undisputed. At least 31 neighbors<sup>27</sup> have voiced opposition. Written public comments were included in the Commission’s meeting packets.<sup>28</sup> At the June 10, 2019 public meeting on this Application, the Commission took public comment from many people both for and against the Application at a meeting that lasted more than four

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<sup>24</sup> R. 871-873.

<sup>25</sup> R. 871.

<sup>26</sup> *S. Anchorage Concerned Coal* at 171 (Alaska 1993) (affirming findings of fact prepared prior to an Anchorage Planning and Zoning Commission hearing).

<sup>27</sup> This number includes all those filing or signing on to an Opening Statement.

<sup>28</sup> For example, R. 576-675 contains the packet for the June 10, 2019 meeting and includes many pages of written public comments.

hours.<sup>29</sup> Many spoke in opposition to the Application, citing concerns about noise from the gravel pit,<sup>30</sup> visual impacts,<sup>31</sup> adequacy of the proposed buffers,<sup>32</sup> and increased traffic of gravel hauling trucks on Anchor Point Road.<sup>33</sup> However, a large number of opponents does not by itself constitute substantial evidence.

The Record contains a large amount of material that the Commission members reviewed before and during the public meetings and deliberations on this Application. This includes several meeting packets and miscellaneous information totaling at least 493 pages out of the 987 pages of the total record, containing written comments from members of the public,<sup>34</sup> maps of the property and surrounding areas,<sup>35</sup> photographs,<sup>36</sup> and diagrams depicting the line of sight to the proposed extraction area.<sup>37</sup> A review of the minutes and verbatim testimony of the Commission's several meetings show that the Commission members listened to and discussed the Application at length. The Commission then adopted extensive findings in Resolution 2018-23 detailing each condition required by KPB 21.29.050. The Application materials, the extensive record, and the detailed findings constitute reasonable evidence in support of the Commission's

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<sup>29</sup> The portion of the hearing transcribed for this matter started at 7:32 pm (T. 117) and ended at 11:39 pm (T. 159).

<sup>30</sup> Testimony of Christina Elmaleh at T. 124, Testimony of Ed Martin, III at T. 133.

<sup>31</sup> Testimony of Pete Kineen at T. 127, Testimony of Todd Bareman at T. 132, Testimony of Richard Cline at T. 136.

<sup>32</sup> Testimony of Vickey Hodnick at T. 134, Testimony of Rick Oliver at T. 135, Testimony of Jim Reid at T. 138, Testimony of Hans Bilben at T. 141, Testimony of Lynn Whitmore at T. 145.

<sup>33</sup> Testimony of Paul Morino and Judy Aaron at T. 123, Testimony of Gary Sheridan at T. 130.

<sup>34</sup> For example, R. 28-60, R. 532-552.

<sup>35</sup> For example, R. 492-495.

<sup>36</sup> For example, R. 487-491, R. 553-558, R.607-614.

<sup>37</sup> For example, R. 726-728.

conclusion that the conditions imposed in Resolution 2018-23 meet the requirements of KPB 21.29.050. The hearing officer finds that the Commission's findings of fact are supported by substantial evidence in the record and deference to those findings is warranted.

## **V. ORDER**

For the reasons stated in this decision, Appellant Hans Bilben's request for the hearing officer to overturn the Commission's decision to approve the Application is DENIED.



L. Annel Goldsmith, Hearing Officer

### **Right of Reconsideration**

Pursuant to KPB 21.20.350, any party that participated in the hearing may request reconsideration of this decision by filing a motion for reconsideration with the Borough Clerk within fourteen (14) days after the date of distribution of this decision. A motion for reconsideration may be based only on the criteria in KPB 21.20.350.A.1.-4. and must comply with all other requirements of KPB 21.20.350.

### **Right to Appeal**

This Decision and Order is a final decision. An appeal from an officer decision may be filed in the Alaska Superior Court within 30 days after the date of distribution of this decision and is governed by Part 6 of the Alaska Rules of Appellate Procedure. This decision remains in effect while an appeal is pending unless stayed by the Alaska Superior Court. See KPB 21.20.350.E. and 21.20.360.

# CERTIFICATE OF SERVICE

I, Michele Turner, Deputy Clerk of the Kenai Peninsula Borough, do hereby certify that, I served the foregoing notice and copies of Hearing Officers Decision.

X  
Signature

Dated this 15<sup>th</sup> day of November, 2019.

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